

Before the
FEDERAL ECOMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Assessment and Collection)	MD Docket No. 02-64
of Regulatory Fees for)	
Fiscal Year 2002)	

To: The Commission

COMMENTS

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast (BMDDP), on behalf of its paging clients licensed in the Part 22 Paging and Radiotelephone Service and the Part 90 Commercial Conventional Industrial/Business Pool Service, hereby submit, pursuant to Section 1.415 of the Commission's Rules, the following comments in opposition to the Commission's proposal, in the above-captioned proceeding to increase, from \$0.05 to \$0.08, the regulatory fee per paging or messaging unit. The proposed fee increase represents a 100 percent increase in the regulatory fee since Fiscal Year 2000, see Assessment and Collection of Regulatory Fees for Fiscal Year 2000, 14 FCC Rcd. 14478 (2000), and a 60 percent increase over the regulatory fee assessment for Fiscal Year 2001, see Assessment and Collection of Regulatory Fees for Fiscal Year 2001, 66 FR 36177 (2001). Because of the fragile nature of the paging industry, BMDDP urges the Commission to maintain the regulatory fee at \$0.05 per subscriber unit.

I. INTRODUCTION.

The vast majority of BMDDP's paging clients are small to medium sized carriers which meet the definition of "small business" or "very small business" under the Commission's classifications and those of the Small Business Administration.¹ These carriers provide paging and messaging services to rural areas as well as communities in small and medium sized markets that might otherwise go unserved by larger carriers. Paging customers encompass a vast array of public safety, business and professional interests. These customers rely on their paging service as an efficient, reliable and low-cost means of communications, despite the availability of two-way cellular and broadband Personal Communications Services (PCS) in the markets that they serve.

Nonetheless, paging carriers are not insulated from the intense competition from cellular and PCS carriers that began in the mid-1980s and the recent softening of demand for telecommunications services in general. Despite dwindling profits and narrower profit margins, many smaller paging carriers have managed to survive at a time when their larger, better financed rivals in the paging industry have not been so fortunate. These largely family owned and operated businesses (some multi-generational) have managed to retain some measure of customer loyalty because they have strong roots in

¹ The Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*, and the Small Business Administration define a "small business" in the telecommunications industry as one that has fewer than 1,500 employees and is not "dominant" in its field of operations. The Commission's paging spectrum auction rules, 47 C.F.R. §22.223, define a "small business as one having attributable average gross revenues of \$15 million or less for the

the communities that they serve and because they place a great deal of emphasis on providing good customer-oriented service. However, not the least of the contributing factors to their survival is being able to maintain a sufficient price differential between their paging services and the more feature-rich broadband two-way communications services, so that their subscribers value being able to receive one-way communications services in a cost-efficient manner. The proposed substantial increase in the regulatory fee will make this virtually impossible.

Since the late 1990's, the paging industry has experienced declining revenues over a number of years as more of its customers migrate to cellular and PCS. Any increase in the cost of providing paging service, regardless of whether the cost is passed on to the subscriber or absorbed by the paging carrier, is a matter of great alarm and concern. Given the sensitivity in the pricing of paging service, it is clear that once the price differential is sufficiently reduced to the point where subscribers to paging service no longer benefit from its value, as compared to cellular or PCS, most paging carriers will not be able to survive the abandonment of their services.

II. THE COMMISSION SHOULD RETAIN THE \$0.05 REGULATORY FEE.

The Commission should not increase the regulatory fee to \$0.08 for Fiscal Year 2002 since this increase would amount to a 100 percent increase in just the last two years and a 60 percent increase over last year. Such an increase could have a disastrous effect

preceding three years and a "very small business" as one having attributable average gross revenues of \$3 million or less for the previous three years.

on an already fragile industry, especially where, as discussed above, profit margins and the paging subscriber base have declined dramatically over the past few years.

A. Declining Paging Industry.

Over the past five years, the paging industry has dramatically declined from a highly competitive, robust industry in early 1996 to an industry that is characterized by low profitability, declining subscriber bases and intense competition from other commercial mobile radio services including digital cellular, 800 MHz SMR cellular like services and broadband PCS. As a result, several major paging carriers, including MobileMedia Corp., TSR Wireless, L.L.C, Arch Wireless and WebLink Wireless, Inc., have declared bankruptcy. And, just recently, MetroCall, the second largest independent paging carrier in the United States has announced that it will file for bankruptcy protection by the end of April, citing a downturn in the paging industry. See Communications Daily, 22, 73 (April 16, 2002).

The Commission's reports confirm that between 1998 and 2000, the percentage change in growth of paging/messaging units drastically decreased from an increase of 4.4 percent per year to a decrease of 1.1 percent per year and that the average monthly revenue per paging unit decreased as well. Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Sixth Report, 16 FCC Rcd 13350 at Table 5 (2001). In its 2000 CMRS Competition Report, the Commission found that in calendar year 1999, while two-way mobile telephony providers generated

\$41.00 per month per subscriber, average paging carrier revenues had dropped to \$8.00 per month per subscriber paging unit.

This precipitous drop in the paging subscriber base and in revenue will be further exacerbated if the paging industry is to be held responsible for paying increased regulatory fees and other federally mandated assessments. In this regard, the Commission is well aware that since the imposition of the regulatory user fees, the paging industry has been burdened with the requirement to contribute to Universal Service, TRS, local number portability, the NAMPA, etc. These increasing expenditures, when added together, impose a significant burden on paging carriers' rate plans at a time when the paging industry as a whole is struggling to maintain its competitive position in the marketplace. An increase of 60 percent over last year's regulatory fee (and 100 percent since Fiscal Year 2000) will only serve to either cause more subscribers to migrate away from paging service (if the user fee increase is passed through to the customer)² or further shrink already slim profit margins; if the increase is absorbed by the paging carrier.

B. Gradualism.

The Commission has long recognized the importance of gradualism in protecting fledgling telecommunications industries against new regulatory charges. In this regard, the Commission has protected interexchange carriers by providing Feature Group A and B

² BMDDP notes that many carriers have multiple pager customers. These customers are typically state or local governments or businesses. If a particular customer has 50 or 100 pagers or more, an increase in the regulatory fee, when multiplied by the number of

discounts in order to foster the continued development of interexchange competition. See Access Charge Reconsideration, 97 FCC 2d 682, 728 (1983); Access Charge Second Reconsideration Order, 97 FCC 2d 834, 861 (1984); Third Reconsideration Order, 101 FCC 2d 1259, 1299 (1985). In 1988, the Commission also created the enhanced service provider (“ESP”) exemption from access charges. See Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers, Order, 3 FCC Rcd 2631 (1988). In so doing, the Commission recognized that the ESP industry required stability in a time of rapid change and that “any alternative to the existing exemption should minimize disruptive effects on ESPs.” Amendments of Part 69 of the Commission’s Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Notice of Proposed Rulemaking, 4 FCC Rcd 3983 3987 (1989). And, the Commission implemented this exemption in such a manner that interexchange carriers received substantial benefits without imposing further burdens on other rate payers. Amendments of Part 69 of the Commission’s Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers, Report and Order on Further Reconsideration and Further Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524, 4535 (1991). See also National Ass’n of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095, 1136 (D.C. Cir. 1984), cert. denied 469 U.S. 1227 (1985) (upholding exemption “to avoid unnecessary customer impact or market displacement”).

paggers issued to the customer, could be significant and cause the customer to reconsider whether or not it is cost effective to retain the paging service.

At the current moment, the paging industry is in dire straights. Several of its top carriers have been forced into bankruptcy, and at least one has been liquidated. Further, it is anticipated that at MetroCall will be filing for bankruptcy protection before the end of the month. Any increases in the paging service price point at this critical time may very well have the effect of further driving price-conscious customers away.³

Accordingly, a freeze on the regulatory user fee would provide paging carriers with much needed assistance to keep their industry afloat by removing at least part of the financial pressure being exerted on the industry in these trying times.

C. Regulatory Fees Based Upon Subscriber Base may be Disastrous to Paging.

Currently, the Commission's regulatory fee structure for messaging/paging services is based upon the number of subscriber units (or paging receivers). While this methodology provides for a fair distribution of the regulatory fee among carriers, it nonetheless has the usurious effect on the industry as the subscriber base declines, as evidenced by the proposed 60 percent increase in the regulatory fee assessment per

³ The Commission may take official notice that the number of paging subscribers nationwide has been in a serious decline. Based upon the Commission's unit estimates, the paging industry has lost approximately 76 million subscribers in a twelve-month period, from approximately 30,000,000 to 23,600,000 subscribers. See Assessment and Collection of Regulatory Fees for Fiscal Year 2001, Notice of Proposed Rule Making, Attachment C, (FCC 01-97) (released March 27, 2001); Assessment and Collection of Regulatory Fees for Fiscal Year 2002, Notice of Proposed Rulemaking, Attachment C, (FCC 02-92) (released March 27, 2002). This is significant because as paging subscribers are lost the cost per subscriber increases and profitability is reduced since carriers must still cover fixed costs that do not change with the number of subscribers served.

subscriber unit for Fiscal Year 2002 (and 100 percent increase since Fiscal Year 2000).⁴ And, as the paging subscriber base continues to dwindle, the annual fee increases will only continue to grow by leaps and bounds. Without a change in the methodology for calculating an appropriate fee, the Commission could quickly find itself in the untenable situation of assessing a regulatory fee that is greater than the carrier would propose to charge for monthly service. This type of a situation would be the death knell to paging.

III. THE REGULATORY FEE INCREASE IS INCONSISTENT WITH POLICIES PROTECTING SMALL BUSINESS.

Congress and the Commission have long recognized that small businesses comprise an important element of the U.S. economy.⁵ Congress has also passed legislation designed to protect small businesses, because of their contributions to universal service and their role in the economy. By imposing a 60 percent increase over last year (and a 100 percent

⁴ While the total regulatory fee to be collected from paging carriers would be increased from \$1.625 million to \$1.776 million (an increase of 9.3 percent), the Commission has proposed to increase the fee per subscriber unit by 60 percent, from \$0.05 to \$0.08.

⁵ Little more than a decade ago, small business produced 43% of the GNP and provided 55% of the nation's jobs. "[B]etween 1969 and 1976, small business created almost two thirds of all new jobs in the national economy." Regulatory Reform: Hearings before the Subcommittee on Administrative Practice and Procedure on the Judiciary, Part 3, 96th Cong., 1st Sess. 343, 344 – 45 (1979). (Small Business: A Critical Element of the American Economy, Remarks of Alfred Dougherty, Jr., Director, Bureau of Competition, Federal Trade Commission) [hereinafter "Dougherty Remarks"]. In the Communications industry, small businesses are the largest provider of rural telecommunications (including mobile services such as paging), especially in those places where larger carriers find that the population and the terrain do not justify their investment. This is evidenced by the sale of a number of telephone exchanges in recent years by Quest to various small telephone companies, including subscriber-owned rural telephone cooperatives.

increase since Fiscal Year 2000) in the regulatory fee for paging carriers, Congress' goals underlying this legislation will be frustrated.

Congress also passed the Regulatory Flexibility Act, Pub. L. No. 96-354, 194 Stat. 1164 (1980), for the reason that "unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes." R.F.A. §2(a)(5). In adopting this legislation, Congress found that the harmful effect of unnecessarily burdensome federal regulations on small businesses does not serve the public interest.⁶ Because a 60 percent increase in the regulatory fee for paging carriers would disproportionately and adversely impact small businesses, by causing them to either raise prices of an already price-conscious subscriber base, at the substantial risk of a defection by subscribers to other types of telecommunications services, or otherwise absorb the financial burden themselves, these carriers may be forced to curtail or otherwise suspend service, through no fault of their own, if paging service cannot be profitably provided. As a result, the imposition of a 60 percent increase in the regulatory fee over that from last year (and 100 percent over Fiscal Year 2000) would contravene the legislative policy underlying the Regulatory Flexibility Act by ultimately decreasing competition in the marketplace.

⁶ "The public interest lies directly in two areas: (1) the disproportionate impact of governmental regulation on small business reduces the competitive capacity of small business, thereby placing Government in that strange position of encouraging economic concentration, and (2) consumers, to a large extent, must pay the cost of regulation in the form of higher prices. Thus, while the most immediate and visible impact may fall to the small [business], the public shares the burden in the form of higher prices." 126 Cong. Rec. 24,575, 24,588.

The proliferation of substantial increases in regulatory fees (especially when coupled with increases in other mandatory fees imposed by the Commission) will only encourage further contraction in the paging industry. This contraction will significantly impair the ability of the remaining, smaller paging carriers to respond to the marketplace for additional service because its resources to provide such service and the ability to raise service fees will have been "eaten" up by the Commission's substantial increases in regulatory user fees (and other mandated fees and contributions).

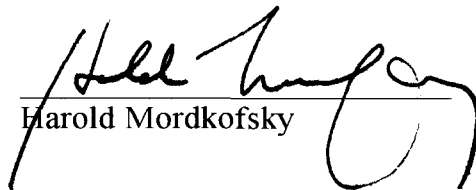
IV. CONCLUSION.

For the foregoing reasons, the Commission should freeze the regulatory fee for paging carriers at \$0.05 per pager in order to prevent further destruction of a vital telecommunications service to the public.

Respectfully submitted,

**BLOOSTON, MORDKOFKY, DICKENS,
DUFFY & PRENDERGAST**

By:


Harold Mordkofsky


Richard D. Rubino

Blooston, Mordkofsky, Dickens,
Duffy & Prendergast
2120 L Street, N.W.
Washington, D.C. 20037
Tel. (202) 659-0830

Filed: April 23, 2002